No. 89-786

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

GARREY CARRUTHERS, *et al.*,
Petitioners,

v.

DWIGHT DURAN, *et al,*
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION

Elizabeth Alexander*
Mark J. Lopez
Alvin J. Bronstein
National Prison Project of the
ACLUF, Inc.
1616 P Street, N.W., Suite 340
Washington, D.C. 20036
(202) 331-0500

Ray Twohig, P.C.
420 Central Avenue, S.W., Suite 200
Albuquerque, N.M. 87102
(505) 843-6223

Mark J.Donatelli
Rothstein, Bailey, Bennett
Daly & Donatelli
136 Grant Avenue
P.O. Box 8180
Santa Fe, N.M. 87504
(505) 988-8004

WASHINGTON DC 20036 — 202-1220

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QUESTIONS PRESENTED

1. Should this Court address the standards for equitable modification of consent decrees in a case in which the trial court and Court of Appeals did not address equitable modification.

2. Whether, in the absence of any factual record, the Eleventh Amendment renders void a consent decree settling prisoners' civil rights, where the scope of appropriate relief necessarily turns upon the resolution of complex factual questions.

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The respondents, a class of prisoners within the New Mexico prison system, respectfully request that this Court deny the petition for writ of certiorari seeking review of the Tenth Circuit's opinion in this case. That opinion is reported at 885 F.2d 1485 (10th Cir. 1989). The district court opinion is reported at 678 F.Supp. 839 (D.N.M. 1988).

STATEMENT OF THE CASE

The following facts, in addition to those stated in the petition, are relevant to the Court's consideration of whether a writ of certiorari should be granted.

A. Factual History

Respondents filed their amended complaint in this case on July 6, 1978. The complaint alleged that the Penitentiary of New Mexico was grossly and inhumanely overcrowded; that the dormitories were filthy and impossible to clean; that security was impossible to provide; that the living quarters were absolutely unfit for human habitation from the standpoint of health and sanitation; that persons confined in the Penitentiary were forced to live in constant fear of their lives; that physical and sexual assaults occurred regularly; that the Penitentiary was severely understaffed; that prisoners were not effectively classified;

that the prison lacked necessary programming; that the high levels of tension and violence resulted from the lack of a meaningful classification system; that the lack of meaningful visitation policies and recreational opportunities contributed to tension, violence, and mental deterioration; that medical care was deliberately indifferent to serious medical needs; that fundamental tenets of due process were not followed in disciplinary hearings; and that prisoners were frequently placed in segregation cells under barbaric and torturous conditions. Pet. App. at 199a - 203a. The complaint alleged that these facts established violations of federal law.[1] Pet. App. at 199a-203a.

While the case was pending, on February 2 and 3, 1980, the Penitentiary of New Mexico experienced a major riot. Thirty-

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[1] It also alleged that the facts established violations of state law.

three prisoners were killed, and at least ninety others were seriously injured, many under unimaginably brutal circumstances.

After the riot, the state legislature required the Attorney General to investigate and report on conditions at the Penitentiary. The Governor and the Attorney General also convened a Citizens' Advisory Panel to evaluate the Attorney General's reports and oversee the rebuilding of the Penitentiary of New Mexico. The Attorney General's Report concludes that overcrowding; understaffing; inadequate classification procedures; inadequate medical, dental, and mental health care; lack of exercise and recreation; non-private visitation; and substandard food all helped to create the intolerable living conditions and extreme inmate frustration that led to the riot. Atty. Gen. Rep. on the February 2 and 3, 1980 Riot at the Penitentiary of New Mexico, 6, 8 (Sept. 1980) (Hereinafter "AG II"). The

Attorney General also condemned arbitrary enforcement of rules and the use of segregation. (AG II at 22, 27).

Following the riot, the parties entered into the consent decree now challenged by petitioners. The Attorney General's Report recognized that the consent decree "will insure that New Mexico will never again deviate so greatly from accepted standards of prison management." (AG II at 46). The Citizen's Advisory Panel agreed that compliance with the consent decree was necessary for improvements to occur. (Rep. of the Citizens' Advisory Panel to the Governor of New Mexico (Sept. 1980), cited in AG II app. at 7).

The requirements of the consent decree have continued to be necessary to assure constitutional conditions within the New Mexico Prison System. In 1986, conditions at the New Mexico prisons, including the facilities built subsequent to

the riot, led the Secretary of the New Mexico Corrections Department to write to the Governor that overcrowding portions of the system was unreasonable and that to reduce security staff while increasing inmate idleness "borders on the irresponsible. There will probably be people hurt and some may be killed during the coming year as these historically tranquil facilities react to these steps." Duran v. Anaya, 642 F.Supp. 510, 523 (D.N.M. 1986). The prison wardens agreed that there was a direct, inverse correlation in the New Mexico prison system between the incidence of acts and threats of violence and the availability of educational and recreational activities for prisoners. Id.

The provisions now challenged by petitioners involve overcrowding, classification procedures, provisions for prisoner discipline, prisoner activities, and visitation rules. The challenged provisions

are directly related to the allegations of the complaint and the conditions that led to the need for the consent decree.

B. Procedural History

On April 24, 1987, petitioners withdrew their previous motion to modify judgment, without prejudice to renewing the motion in the future. At the same time, petitioners told the trial court that it would be "more efficient and sensible" for the trial court to withhold ruling on other pending motions to modify portions of existing orders because the petitioners intended to file a new jurisdictionally-based motion. The trial court allowed the petitioners to withdraw their pending motion to modify judgment without prejudice and indicated that it was awaiting the petitioners' new motion. Duran v. Carruthers, No. 77-0721-JB (D.N.M. June 4, 1987) (Order withdrawing defendants' motion

to modify judgment).

On June 12, 1987, the petitioners filed their jurisdictionally-based motion, the motion involved in this petition. That motion sought to vacate portions of the consent decree that, petitioners alleged, went beyond the requirements of federal law and were therefore void and unenforceable under the Eleventh Amendment.

Footnote 1 to the petitioners' brief in the trial court reads in pertinent part as follows:

> Unlike the pending modification motion that the Court heard last December -- and other similar modification motions that defendants may file in the future -- the present motion does not raise factual issues about present prison conditions. This motion is limited to those portions of the decree that are unenforceable as a matter of law because they purport to create entitlements that, on their face, cannot be construed as legitimate measures for vindicating federal rights. Because the Eleventh Amendment arguments raised here are quasi-jurisdictional, the Court should address these issues before deciding the pending modification motions covering many of the same portions of

the decree.

Brief for Defendants at 1-2, n. 1, Duran v. Carruthers, 678 F.Supp. 839 (D.N.M. 1988) (Emphasis added).

The trial court took petitioners at their word. The court decided only that the Eleventh Amendment did not require it to vacate the challenged portions of the consent decree on their face, without regard to current conditions in the institution or the factual interplay between these portions of the consent decree and other portions of the consent decree.

At the same time, the trial court indicated that the defendants were entitled to return to the trial court under F.R.Civ.P. 60(b)(5) for consideration of equitable modification of the decree:

> Defendants' motion also seeks to vacate portions of the 1980 decree. Although the rule under which this relief is sought is not explicated, the structure of the argument makes clear defendants seek relief under Rule 60(b)(4), Fed.R.Civ.P., which provides that relief from final judgment should

be granted when "the judgment is void." See Defendants' brief, p. 13. As noted earlier, footnote 1 of defendants' brief suggests that if their comity-based arguments are rejected at the jurisdictional level, they should inform the Court's assessment of the propriety of modification. As is made clear in this order, defendants' jurisdictional arguments seeking vacation of the decree are rejected in that they are unsupported by existing law. The Court is mindful, however, that under certain circumstances, a judgment may be modified or altered in its prospective application. The potential legal bases for action of this kind need not be set out here, although the Court has addressed the issue as a general matter previously. See Order of October 3, 1986. That order evidences the Court's awareness of United States v. Swift, 286 U.S. 106, 52 S.Ct. 460, 76 L.Ed.2d 999 (1932); New York Association for Retarded Children, Inc. v. Carey, [706 F.2d 956 (2d Cir. 1983) cert. denied, 464 U.S. 915 (1983)]; Newman v. Graddick, 740 F.2d 1513 (11th Cir. 1984), and related cases.

The "flexible" approach to modification set out in Carey and related cases permits the Court to assess requests for modification that promote the interest of comity by preserving state administrative discretion as to the means of accomplishing the particular objectives set forth in a decree. That process, however, involves careful assessment not only of the structure of the order and its relationship to administrative discretion, but of other factual

> considerations including, but not limited to, the state of compliance with existing orders, the degree to which any federal constitutional violations have been cured "root and branch," and the existence of safeguards to prevent future violations. That complex inquiry is one the Court will not undertake in the absence of an appropriate, comprehensive evidentiary record and a thorough briefing on the appropriate standards for modification, to include the equitable bases for modification and the particular modification sought.*
>
> * The Court is mindful that some endeavor to this end has been undertaken previously. The defendants, however, terminated that process by filing the motion that is the subject of this order.

Pet. App. at 44a.

Instead of filing a motion for equitable modification,[2] the petitioners appealed the denial of their Eleventh Amendment motion to the Tenth Circuit. The Tenth Circuit affirmed the trial court, rejecting the petitioners' Eleventh Amendment

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[2] The petitioners have still refused to file such a motion in the trial court.

argument.[3]

In a footnote, the Tenth Circuit made clear that its ruling did not bar petitioners from presenting a motion for equitable modification to the trial court:

> The present appeal concerns only the propriety of the district court's order denying defendants' motion to vacate parts of the 1980 consent decree. We are not here concerned with defendants' right, if any, to have "equitable modification" of that decree.

Pet. App. at 15a, n. 12.

The petitioners took the position both in the trial court and the Court of Appeals [Brief for Defendants at 6, n. 14, Duran v. Carruthers, 885 F.2d 1485 (10th Cir. 1989)] that they were not seeking modifications based on changed factual circumstances. The respondents are prepared

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[3] The petitioners do not frame the issue upon which they seek certiorari as an Eleventh Amendment issue. Instead, petitioners claim that the issue is whether a court may refuse to vacate portions of a consent decree when subsequent legal developments make clear that those provisions go beyond the requirements of federal law.

to respond to any motion for equitable modification based on a claim of changed circumstances, as long as they are afforded the opportunity of making a full factual record of the potential impact of the proposed modifications on overall health and safety within the New Mexico prison system.

SUMMARY OF ARGUMENT

The trial court and the Court of Appeals decided only the issue of whether the Eleventh Amendment rendered the consent decree void on its face. Both courts held that the consent decree was not void under the Eleventh Amendment, and refused to consider questions of equitable modification in the absence of an appropriate factual record. Now the petitioners seek certiorari on a question that is necessarily a question of equitable modification. No question of equitable modification is properly before this Court.

Moreover, petitioners are not correct in arguing that this Court's decision in System Federation No. 91, Ry. Employees' Dep't v. Wright, 364 U.S. 642 (1961) stands for a general proposition that relief in a consent decree that goes beyond the requirements of federal law is void. In Local Number 93 v. City of Cleveland, 478 U.S. 501 (1986) this Court held that when a consent decree is within the trial court's subject matter jurisdiction, is within the general scope of the pleadings, and furthers the general objectives of the law, the consent decree is valid. 478 U.S. at 525. In addition, contrary to petitioners' argument, there has been no change in the law since the entry of the consent decree that renders this consent decree inconsistent with federal law.

Because petitioners do not challenge that the allegations of the complaint, if proven, would entitle the respondents to relief for violations of constitutional rights under Ex

Ex Parte Young, 209 U.S. 123 (1908), the Eleventh Amendment was not violated by entry of the consent decree. By consenting to entry of the decree, the petitioners waived the right to challenge either the facts showing the existence of constitutional violations or the appropriateness of the remedy chosen by the parties. Any other rule would introduce serious theoretical and practical uncertainties into the law of consent decrees.

Because equitable modification remains open to petitioners, this case does not present any special and important reasons justifying the granting of a writ of certiorari. The decision of the Tenth Circuit, that the Eleventh Amendment did not render void the consent decree entered in this case, is consistent with the decisions of every other federal court that has considered the issue.

REASONS FOR DENYING THE WRIT

I. NO IMPORTANT ISSUE OF FEDERAL LAW IS PRESENTED BY THE PETITION

A. The Courts Below Did Not Decide the Issue of Equitable Modification.

As noted in the Statement of the Case, the issue presented to the trial court was very different from the issue petitioners seek to present to this Court. In petitioners' brief in the trial court, they argued that the portions of the decree they challenged were void and unenforceable under the Eleventh Amendment. Brief for Defendants at 13, Duran v. Carruthers, 678 F.Supp. 839 (D.N.M. 1988).

This was the only argument that the parties briefed or that was decided in the district court. Indeed, the district court, in limiting its consideration to this issue did precisely what the petitioners had asked the trial court to do in their memorandum brief in support of their motion. See p. 9, supra.

In the petitioners' briefs in the Court of Appeals, they claimed for the first time that, not only had the issue of discretionary modification been raised in the trial court, but also that it had been decided in the trial court. As noted, this argument is not supported by a reading of the trial court's decision. See pp. 9-11, supra. Similarly, the Tenth Circuit did not decide the issue of whether equitable modification is appropriate under F.R.Civ.P. 60(b)(5). See p. 12, supra.

B. The Issue on Which the Petitioners Seek Certiorari Is an Issue of Equitable Modification, and Is Not Properly Before This Court.

The petitioners seek certiorari on whether a federal court may refuse to vacate portions of a consent decree that go beyond the requirements of federal law "as legal developments since entry of the decree make clear." Petitioners' argument is based on System Federation No. 91, Ry. Employees Dep't

v. Wright, 365 U.S. 642 (1961) a case in which this Court modified a consent decree following a change in the underlying statute. See, Pet. at 16. Petitioners argue that changed legal circumstances require prospective modification of the decree.

In System Federation, this Court decided that in view of an amendment to the Railway Labor Act, enacted subsequent to the entry of the consent decree at issue in the case, the trial court abused its discretion by refusing to modify the consent decree. System Federation, at 651-53. The language of System Federation makes clear that the Court, in that case, was ruling on the propriety of equitable modification:

> There is also no dispute but that a sound judicial discretion may call for the modification of the terms of an injunctive decree if the circumstances, whether of law or fact, obtaining at the time of its issuance have changed, or new ones have since arisen. The source of the power to modify is of course the fact that an injunction often requires continuing supervision by the issuing court and always a continuing willingness to apply its

> powers and processes on behalf of the party who obtained that equitable relief.

Id. at 647. See also id. at 645, n. 4, noting that the relevant provisions of Rule 60(b) were Rule 60(b)(5) dealing with equitable modification, and Rule 60(b)(6) dealing with any other reason justifying relief from the operation of the judgment.

Consideration of the basis for modification in System Federation makes clear why the lower courts did not cite this case; System Federation is not relevant to the single issue involving the Eleventh Amendment decided in the lower courts. For the reasons stated in the previous section, issues of equitable modification were not considered by the lower courts, although they remain open to the petitioners on remand.

C. System Federation Does Not Require Modification of the Decree.

1. System Federation Involved a Consent Decree that Had Become Inconsistent with the Statute upon which the Consent Decree Was Based.

Local Number 93 v. City of Cleveland, 478 U.S. 501 (1986) discusses the applicability of System Federation to modification of consent decrees. Local Number 93 interprets System Federation as a case in which the Court found the consent decree inconsistent with the terms of the statute on which the consent decree was based. Local Number 93, 478 U.S. at 526-27. Local Number 93 reaffirms that when a change in the law renders the relief granted in the consent decree inconsistent with the statute on which the consent decree is based, the consent decree should be modified. Id. at 526. At the same time, Local Number 93 makes clear that merely because relief granted in the consent decree goes beyond the relief required by law, the consent decree is not inconsistent with the underlying statute.

Because System Federation was a case involving a provision of a consent

decree that had become inconsistent with the underlying statute as a result of an amendment to that statute, System Federation does not establish a blanket rule that all subsequent changes in the law require modification.

Similarly, Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424 (1976), also does not establish a principle that every intervening development in the law requires a court to modify a consent decree. In Spangler, this Court considered the developments in the law in light of the particular circumstances of the case:

> The ambiguity of the [challenged] provision itself, and the fact that the parties to the decree interpreted it in a manner contrary to the interpretation ultimately placed upon it by the District Court, is an added factor in support of modification. The two factors taken together make a sufficiently compelling case so that such modification should have been ordered by the District Court. System Federation v. Wright, supra.

Id. at 438.

2. There Has Been No Intervening Change in the Law Justifying Modification

Even if petitioners had raised the issue of equitable modification in the lower courts, there have been no intervening changes in the law that now require modification of the decree. The two cases that petitioners specifically cite as demonstrating a change in the law are Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89 (1984) and Rhodes v. Chapman, 452 U.S. 337 (1981). Pennhurst does not affect this case, however, because here all the allegations of the complaint are based on federal law.[4] Pennhurst, of course, would have some possible application to this case only if some portion of the requested relief were based solely on state law. The fundamental rule is that a federal court may

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[4] The complaint also presented state law claims, but every allegation of the complaint had a specific basis in federal law. See Pet. App. 196a - 206a.

enforce a consent decree whose provisions mandate appropriate remedies for all constitutional violations that would have been established if the plaintiffs had proven every factual claim they had alleged in the complaint.

Rhodes v. Chapman did not change the basic principle that under certain facts prison conditions fall so far below civilized standards that they violate the Eighth Amendment. See Rhodes v. Chapman, 452 U.S. at 352 (1981), stating that "[w]hen conditions of confinement amount to cruel and unusual punishment, 'federal courts will discharge their duty to protect constitutional rights'" and citing, in an accompanying footnote, four prison cases in which overcrowding was found unconstitutional. It cannot be questioned that the conditions of confinement in New Mexico, as alleged in the complaint, amounted to cruel and unusual punishment. The trial

court was therefore justified in entering a comprehensive remedy, as chosen by the parties, to correct the constitutional violations.

D. The Courts Below Correctly Applied Local Number 93.

The lower courts correctly applied Local Number 93 to this case. As in Local Number 93, the challenged provisions of the consent decree are not inconsistent with the law underlying the consent decree. Neither 42 U.S.C. § 1983 nor the Eighth Amendment bars a federal court from entering a consent decree in which the state or local officials agree to a remedy for a constitutional violation that might, if the case were litigated, be different from the remedy that a federal court might enter after trial:

> Accordingly, a consent decree must spring from and serve to resolve a dispute within the court's subject-matter jurisdiction. Furthermore, consistent with this requirement, the consent decree must "com[e] within the general scope of the case made by the pleadings," and must further the

> objectives of the law upon which the complaint was based. However, in addition to the law which forms the basis of the claim, the parties' consent animates the legal force of a consent decree. Therefore, a federal court is not necessarily barred from entering a consent decree merely because the decree provides broader relief than the court could have awarded after a trial.

Local Number 93, 478 U.S. at 525 (citations omitted).

Petitioners argue that Local Number 93 applies only to entry of a consent decree, not to the modification of a consent decree. Pet. at 21. It is true that the Court in Local Number 93 distinguishes between the entry of a decree and certain modifications of a consent decree. That discussion in Local Number 93, however, distinguished the entry of consent decrees from attempts to modify a consent decree to provide greater relief over the objection of a defendant. Id. at 529. Local Number 93 acknowledges that under Firefighters Local Union No. 1784 v. Stotts, 478 U.S. 561 (1981), a court in

a Title VII case cannot modify an injunction over a defendant's objections in order to provide greater relief than the court could order following trial. Local Number 93, 478 U.S. at 527-28. This is a completely different issue from the issue of the enforceability of a consent decree as written.

E. The Lower Courts Correctly Decided the Eleventh Amendment Issue Presented by Petitioners.

1. The Petitioners Waived Any Challenge to the Factual Allegations in the Complaint.

The petitioners argued, in the trial court and the Court of Appeals, that Pennhurst stood for a general principle that relief that went beyond the requirements of federal law violated the Eleventh Amendment and, therefore, such relief, even if incorporated into a final consent decree, was void.

The Tenth Circuit, in a unanimous opinion, rejected this argument as

applied to this case, and affirmed the trial court. The Court of Appeals noted that Ex Parte Young, 209 U.S. 123 (1908) establishes that the Eleventh Amendment allows a federal court to grant injunctive relief against a state official who has violated federal law, and that Pennhurst does not disturb this fundamental holding of Ex Parte Young. Pet. App. at 11a.

The Court of Appeals further noted that the complaint claimed that the totality of overcrowding and other conditions at the Penitentiary of New Mexico falls beneath standards of human decency, inflicts needless suffering and creates an atmosphere that threatens prisoners' mental and physical well-being and results in the physical and mental deterioration of prisoners.

As the Court of Appeals noted, the petitioners never disputed that the allegations of the complaint, if established, entitled the respondents to relief for

violations of constitutional rights. (Pet. App. at 11a, 13a). Indeed, petitioners admit in this Court that safety is among the essential human needs protected by the Eighth Amendment. Pet. at 5. The allegations of the complaint that petitioners cannot now challenge, by virtue of signing the consent decree, tied overcrowding, the lack of classification, the lack of programming, the lack of visitation, and the arbitrary discipline to the lack of personal safety existing in the prison. Moreover, by consenting to the remedy provided by the consent decree, the petitioners waived the right to challenge the specific remedy chosen by the parties.[5]

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[5] Cf. United States v. Armour & Co., 402 U.S. 673, 681 (1971), quoted in Local Number 93, 478 U.S. at 522:

> Consent decrees are entered into by parties to a case after careful negotiation has produced agreement on their precise terms. The parties waive their right to litigate the issues involved in the case and thus save themselves the time, expense, and

The Tenth Circuit cited Swift & Co. v. United States, 276 U.S. 311, 329 (1928), for the proposition that by consenting to entry of the decree, the petitioners gave the trial court power to construe the pleadings and to find in them the existence of circumstances justifying the relief provided by the consent decree.[6] The importance of this principle comes from the complex factual inquiry necessarily involved in determining whether prison conditions fall below constitutional minima.

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inevitable risk of litigation.

[6] Here again, the defendants ignore the fact that by consenting to the entry of the decree, "without any findings of fact," they left to the Court the power to construe the pleadings, and in so doing, to find in them the existence of circumstances of danger which justified compelling the defendants to abandon all participation in these businesses, and to abstain from acquiring any interest hereafter.

Swift, 276 U.S. at 329, quoted in Duran, Pet. App. at 11a.

Depending on the particular circumstances, a variety of remedies in a particular case might be chosen by prison officials to restore personal safety and order. The parties chose these particular provisions in the context of the unique problems of the New Mexico prison system in the aftermath of one of the two bloodiest prison riots in American history. That riot demonstrated the need for fundamental change to restore the system to constitutional order. Petitioners do not challenge that the facts alleged in the complaint, if proven, demonstrated serious constitutional violations. In this context, the Eleventh Amendment does not render the remedies chosen void.

2. Eighth Amendment Issues Cannot Be Decided in a Factual Vacuum.

Because the petitioners waived any challenge to the factual allegations of the complaint, and petitioners admit that the

allegations of the complaint stated a violation of the Eighth Amendment, they cannot now challenge the factual allegations or that the allegations, if proven, would have entitled respondent to appropriate relief. Because of the nature of the Eighth Amendment, the relief required to cure such constitutional violations cannot be determined in a factual vacuum.[7]

Moreover, when necessary to remedy an unconstitutional totality of conditions, particular relief not required ab initio under the Constitution may be absolutely critical to curing the overall constitutional

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[7] See, e.g., Rhodes v. Chapman, in which this Court analyzed the lower court's findings of fact to determine whether an Eighth Amendment violation existed. Under the particular facts of the case, the Court found no Eighth Amendment violation. At the same time, the Court reaffirmed that prison conditions "alone or in combination" may violate the Eighth Amendment (452 U.S. at 347) and gave examples of cases in which lower federal courts had appropriately found Eighth Amendment violations under the particular facts of the cases. Id. at 352, n. 17.

deficiencies.[8] In Hutto v. Finney, 437 U.S. 678 (1978), for example, this Court considered a challenge to a court order affecting the Arkansas prison system that limited punishment in isolation to a maximum of thirty days for prison disciplinary offenses. This Court held that, in the particular factual context of the case, the trial court was justified in imposing the order:

> Confinement in a prison or in an isolation cell is a form of punishment subject to scrutiny under Eighth Amendment standards. Petitioners do not challenge this proposition; nor do they disagree with the District Court's original conclusion that conditions in Arkansas' prisons, including its punitive isolation cells, constituted cruel and unusual punishment. Rather, petitioners single out that portion of

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[8] This principle also applies to remedial orders not involving the Eighth Amendment. Once a constitutional violation is established, remedial decrees may require actions not independently required by the Constitution if those actions are, in the judgment of the court, necessary to correct the constitutional deficiencies. Milliken v. Bradley, 433 U.S. 267 (1977) (Milliken II); Gilmore v. City of Montgomery, 417 U.S. 556 (1974).

> the District Court's most recent order that forbids the Department to sentence inmates to more than 30 days in punitive isolation.
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> * * *
>
> The length of time each inmate spent in isolation was simply one consideration among many. We find no error in the court's conclusion that, taken as a whole, conditions in the isolation cells continued to violate the prohibition against cruel and unusual punishment.
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> * * *
>
> The order is supported by the interdependence of the conditions producing the violation. The vandalized cells and the atmosphere of violence were attributable, in part, to overcrowding and to deep-seated enmities growing out of months of constant daily friction.... Like the Court of Appeals, we find no error in the inclusion of a 30-day limitation on sentences to punitive isolation as a part of the District Court's comprehensive remedy.

Hutto, 437 U.S. at 685, 687-88 (footnote omitted).

Ironically, in this case, one of the specific provisions that petitioners challenge is the thirty-day limitation on disciplinary isolation, the very provision

upheld in Hutto. Hutto conclusively establishes that, under appropriate factual circumstances, the order petitioners challenge may be constitutionally required.

Petitioners argue that Hutto does not support the thirty-day limitation on disciplinary isolation in this case because "the Court indicated that the time limit could be removed if the deficiencies in provisions for basic inmate needs were corrected." Pet. at 24, n. 34. The petitioners' comment underlines our point: what particular provisions are required as constitutional remedies cannot be determined in a factual vacuum. As the trial court and Court of Appeals noted, such questions should be resolved only in the context of an appropriate factual record. This is precisely what this Court required in Hutto:

> Cooperation on the part of Department officials and compliance with other aspects of the decree may justify elimination of this added safeguard in the future, but it is entirely appropriate for the District Court to

> postpone any such determination until the Department's progress can be evaluated.

437 U.S. at 687, n. 9.

Hutto thus strongly supports the lower court's resolve to decide possible issues of equitable modification only on a full factual record.

Each item of relief in the consent decree that petitioners challenge in their motion can be defended on similar grounds. To say that the petitioners cannot sign a consent decree that binds them to what may appear a remedy more intrusive or expensive than a court would have ordered after trial for a constitutional violation is to distort the Eleventh Amendment beyond recognition. Surely state defendants must be allowed to make a free choice that a particular remedy is appropriate, even though the remedy, viewed in the abstract, goes beyond constitutional minima.

3. The Petitioners' Argument Presents Serious Theoretical and Practical Difficulties.

There are insurmountable difficulties if the Court accepts the petitioners' post hoc piece-meal challenge to a consent decree of this kind. How will a court know what items of relief go beyond the Constitution when the proof available to the parties has long since vanished? Under what standards will a court decide that relief goes beyond constitutional requirements when the defendants challenge, out of context, a few discrete items out of a total package designed to remedy an unconstitutional totality of conditions? These problems are magnified in this case because the petitioners took the position that they had no responsibility to make any factual record showing the constitutionality of either current or past actual conditions in the prison system. The courts below were asked to make the decision about the

constitutionality of the system in a complete factual vacuum.

Just as important, the petitioners' argument, if accepted, would drastically reduce the circumstances under which plaintiffs can settle with state officials, since plaintiffs could not rely on defendants' agreement not to contest relief. Certainly requiring trials of all cases involving state defendants will impose tremendous burdens on the federal judiciary, particularly because these cases when tried on the merits are notoriously long and complicated. Nor is it easy to see why concerns for federal-state relations should lead federal courts to enforce policies that undermine the possibility for settlement in such cases. If plaintiffs cannot enter into a binding settlement with state officials, then defendants, regardless of their wishes, will have no choice but to have their constitu-

tional failings formally proven in court.[9]

F. The Case Does Not Present an Issue of General Legal Importance.

The first reason that petitioners give to justify seeking a writ of certiorari is that the issue is vitally important to the ability of states to administer institutions when the states have entered into consent decrees. Petitioners contend that under the Tenth Circuit's ruling, such institutions will continue "under close federal court supervision indefinitely and without justification in federal law." Pet. at 13 (footnote omitted).

For the reasons set forth above, no such issue is presented to this Court. Both lower courts explicitly stated that they were not deciding issues of equitable modification; consequently, petitioners are free at any time to return to the trial court to seek equitable modification.

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[9] For the reasons noted elsewhere in this response, equitable modification of course remains available.

Moreover, the lower courts followed well-established law in rejecting the petitioners' Eleventh Amendment jurisdictional challenge to the consent decree. We also believe that it was not an abuse of discretion for the trial court to decide the jurisdictional issue before it entertained motions for equitable modification and that the trial court appropriately indicated that such a motion would only be considered on a full factual record.

But even if the Court were not persuaded that respondents and the lower courts are correct on these points, the issues have no general legal importance. Any possible error in the rulings of the lower courts will become of no practical import as soon as the petitioners return to the trial court seeking equitable modification. At that time, petitioners will be able to argue that each of the modifications they seek is appropriate, and the respondents will have

an opportunity to prepare a full factual record in response to the motion. If either party should eventually seek further review in this Court, this Court's judgment will also be informed by an appropriate factual record. For these reasons, the petition does not present an important legal issue that should be settled by this Court now. See Sup.Ct.R. 17.[10]

Moreover, it is apparent, for the reasons given in this response, that, if adopted, the petitioners' argument about the Eleventh Amendment has numerous potentially troublesome conceptual and practical implications. No such conceptual problems attend the familiar concept of equitable modification. Because appropriate continuing supervision of consent decrees can occur through the well-developed mechanism of

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[10] As of January 1, 1990, the substance of this rule will be contained in Sup.Ct.R. 10.

equitable modification, there is no good reason for this Court to enter the thicket of the petitioners' argument.[11]

II. NO CONFLICT AMONG THE CIRCUITS IS CREATED BY THE LOWER COURT'S DECISION IN THIS CASE

As noted above, in this case the Tenth Circuit decided that, when the allegations of a complaint are based on federal law, and the relief granted under the consent decree is related to the constitutional violations charged, the Eleventh Amendment does not require that the decree be vacated.

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[11] Petitioners rightly do not claim that either United States v. City of Yonkers, 856 F.2d 444 (2d Cir. 1988), cert. granted sub nom., Spallone v. United States, 109 S.Ct. 1337 (1989), or Missouri v. Jenkins, 855 F.2d 1295 (8th Cir. 1988), cert. granted, 109 S.Ct. 1930 (1989) is relevant to the disposition of this case. Spallone involves questions of contempt and legislative immunity not at issue in this case, while Jenkins involves federal courts' power to impose state taxes, which is also not here at issue.

In Kozlowski v. Coughlin, 871 F.2d 241 (2d Cir. 1989), the state defendants also argued that the Eleventh Amendment required vacating a consent decree because the decree went beyond due process requirements. The Second Circuit, like the Tenth Circuit, held that because constitutional violations were alleged in the complaint, the Court had subject matter jurisdiction to enter the consent decree, so that the Eleventh Amendment did not require vacating the decree.[12] Id. at 244.

Similarly, the Fifth Circuit in Ibarra v. Texas Employment Comm'n, 823 F.2d 873 (5th

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[12] Two additional circuits would necessarily come to the same result as the Tenth Circuit. The First and Third Circuits have held that entry of a consent decree can serve to waive a state's Eleventh Amendment immunity with regard to the decree. See Garrity v. Sununu, 752 F.2d 727, 730 (1st Cir. 1984) and Delaware Citizens' Council for Clean Air v. Commonwealth of Pennsylvania, 678 F.2d 470, 475 (3rd Cir.), cert. denied 459 U.S. 969 (1982). The Tenth Circuit did not reach the issue of waiver of the Eleventh Amendment defense.

Cir. 1987), also rejected the argument that there is an Eleventh Amendment defense to a consent decree when the consent decree is based on federal law:

> The concerns about state sovereignty and the lack of any federal interest that were critical to Pennhurst are not appropriate when, as in this case, the issue is one of interpreting federal law. Pennhurst "speaks not to this situation but proscribes federal courts from requiring states to conform their conduct to state law qua state law."

Id. at 877 (citations omitted).

The petitioners cite two cases as creating a conflict with the decision of the Tenth Circuit in this case. The first is Lelsz v. Kavanagh, 807 F.2d 1243, reh'g denied, 815 F.2d 1034 (5th Cir.) cert. dismissed, 483 U.S. 1057 (1987). In Lelsz, the Fifth Circuit vacated a further remedial order entered pursuant to consent decree provisions that were based solely on state law. Ibarra explicitly limits the application of Lelsz to cases in which the underlying consent

decree was based solely on state law.[13] Accordingly, because Lelsz decided an issue involving a state law claim embodied in a consent decree, the decision does not conflict with this case. Indeed, Ibarra makes clear that the law in the Fifth Circuit on this issue is exactly the same as the law in the Tenth and Second Circuits.

Petitioners attempt to suggest that there is a conflict between this case and Lelsz by citing dicta in Lelsz that Local Number 93 does not apply to the modification of consent decrees.[14] In fact, the Lelsz court dicta applied the first prong of the Local Number

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[13] In Ibarra, as in this case, the complaint alleged that the relief sought was based both on federal and state law.

[14] The issue in Lelsz involved a further remedial order entered to enforce the consent decree provisions based on state law. The Lelsz court held that the consent decree did not require the further remedial order. Lelsz, 807 F.2d at 1252. Given that holding, the Lelsz court had no need to address the validity of the underlying consent decree provisions.

93 test by assessing whether or not the trial court had jurisdiction to enter the consent decree. Id. at 1252. Lelsz stands for the proposition that, in view of the fact that the underlying consent decree was explicitly based on state law, Local Number 93 does not bar an Eleventh Amendment challenge. This proposition is not inconsistent with either this case or Kozlowski.

Washington v. Penwell, 700 F.2d 570 (9th Cir. 1983), cited by petitioners to support their argument that there is a conflict among the circuits, also does not involve a conflict with this case. Washington turned on the trial court's finding that the defendants and their counsel lacked the authority under Oregon state law to sign the consent decree. Id. at 573. The consent decree on its face created funding obligations running directly against the State of Oregon. Because the Attorney General had no authority to enter the consent decree, the

Ninth Circuit vacated the consent decree under the Eleventh Amendment. Id. at 574-75. In contrast, no finding exists in this case that the consent decree was illegal under state law. Nor does any funding provision of the consent decree run directly against the State of New Mexico. Under these circumstances, nothing in Washington creates a conflict with this case.

Petitioners also cite Ruiz v. Estelle, 679 F.2d 1115 (5th Cir. 1982), and Nelson v. Collins, 659 F.2d 420 (4th Cir. 1981) as examples of the circuits' various approaches to modification.[15] Once again, these cases do not conflict with this case or any of the

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[15] Contrary to petitioners' allegation, Ruiz did not reject the Fifth Circuit's totality of the circumstances approach in prison cases: "[It is] evident that Rhodes v. Chapman does not reject the 'totality of conditions' test that we applied in Jones v. Diamond....we read the majority opinion in Rhodes v. Chapman as adopting that test just as another panel of this court recently did in Stewart v. Winter." Ruiz, 679 F.2d at 1139 'citations omitted).

other cases previously considered in this section. Both Nelson and Ruiz, unlike this case, involved the equitable modification of decrees.

The Tenth Circuit held that the Eleventh Amendment does not require a court to vacate a consent decree grounded in federal law, regardless of factual circumstances; no other federal court has disagreed with that holding. This case, accordingly, does not afford the Court an opportunity to resolve a conflict among the Circuits. For the above reasons, review of this case should be denied.

Respectfully submitted,

Elizabeth Alexander*
Mark J. Lopez
Alvin J. Bronstein
National Prison Project
of the ACLUF, Inc.
1616 P Street, N.W.
Suite 340
Washington, D.C. 20036
202/331-0500

* Counsel of Record

Ray Twohig, P.C.
420 Central Avenue, S.W.
Suite 200
Albuquerque, N.M. 87102
505/843-6223

Mark J. Donatelli
Rothstein, Bailey, Bennett
Daly & Donatelli
136 Grant Avenue
P.O. Box 8180
Santa Fe, N.M. 87504
505/988-8004

Attorneys for Respondents

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